NO. 4094

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL LUND,

Plaintiff-Appellant,

vs.

TOWN OF PETERSBURG,

Defendant-Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE, AT JUNEAU.

BRIEF OF APPELLEE

HENRY RODEN,
Juneau, Alaska,
Attorney for Appellee.

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ARGUMENT.

The appellant complains because the lower court sustained a general demurrer and entered judgment dismissing his complaint.

In his opening brief plaintiff presents three questions for the consideration of the Court; they are:

1st: May the Municipality of Petersburg levy a tax upon real and personal property within its limits in excess of 2% annually upon the assessed valuation of such property?

2d: May the Town of Petersburg sell electric power to be used outside the corporate limits?

3d: Has the Town of Petersburg authority to bind itself to pay the bonds before the expiration of the period prescribed by the Act of Congress under which such bonds are authorized?

The Acts of Congress under which said Town of Petersburg proposes to issue the bonds are found in the printed record, at pages 12, 13, 14 and 15 thereof. Both Acts are the same except that the second permits a total issue of $150,000 worth of bonds.

The questions raised by the appellant concern the issuance and sale of Electric Light & Power Bonds in an amount not exceeding $115,000.00.

Like the appellant, the appellee will consider the various points raised in their numerical order.

I.

HAS THE TOWN OF PETERSBURG AUTHORITY TO LEVY A TAX UPON REAL AND PERSONAL PROPERTY IN EXCESS OF TWO PER CENT. ANNUALLY UPON THE ASSESSED VALUATION OF SAID PROPERTY

WITHIN THE CORPORATE LIMITS IN ORDER TO PROVIDE FOR THE PAYMENT OF THE BONDS AND THE INTEREST ON THE SAME?

Congress has granted to the Town of Petersburg power and authority to issue bonds for the construction of a Municipal Light & Power Plant. Has it also given power to pay the interest on such bonds and to provide for a sinking fund to redeem and pay for them? The Congressional Acts are silent upon these points.

Under the general Municipal Law in Alaska a municipality cannot incur a greater indebtedness or liability in any one year than the current revenues of the municipality for that year, nor can a municipality issue any bonds.

Unquestionably the Acts of Congress referred to were passed to overcome the provisions of this section.

It is claimed that the Town of Petersburg, like other municipalities in the Territory of Alaska, is limited in its power of taxation to two per cent. of the assesed value of all real and personal property within the corporate limits, and that the total assessed value of all such property the past year was less than $600,000.00, and that consequently the returns from this source are not sufficient to meet the ordinary municipal expenses and in addition thereto the interest charges on the bonds and

the requirements of the ordinance providing for a sinking fund.

In answer it may be said that it nowhere appears in the complaint that the Town of Petersburg has exercised its full taxing power. It is not shown that a full two per cent. levy on all taxable property has been made, nor is it shown that the property subject to taxation has been assesed at anything like its fair value; and it may reasonably be inferred that, as neither of these points is covered in the complaint, they do not in fact exist, in other words, that the revenues from taxation can be greatly increased by levying a full two per cent. and assessing the taxable property at its full but fair value.

Granting for the sake of argument that last year's revenues of the Town are not sufficient to cover all municipal requirements and, in addition, the interest charges and sinking fund requirements, there is no allegation in the complaint to indicate that in the future the revenues of the Town will not be sufficient to cover all requirements. The amount of the tax, as the Lower Court in its opinion states, if any is to be levied, "is a matter of future computation, and it is impossible for plaintiff or anyone else to say at this time that the revenues of the Town will be insufficient to meet the required payments." The town may anticipate increased revenues from property taxation and from the greater facilities provided by the proposed Light &

Power Plant and the sale of light and power therefrom.

Commissioners of Pitt County v. McDonald et al; 61 SE 643.

Aside from all this, we respectfully suggest that the Municipality of Petersburg having from Congress authority to incur a special indebtedness has also implied authority to levy a tax in excess of two per cent. of the assessed value of the total property within the municipality.

The provisions of law referred to, limiting the municipal taxing power to two per cent., refers to revenues used for the ordinary and usual business of the municipality.

It must be remembered that there is no constitutional limitation of the taxing power of a municipality in Alaska.

Congress, as the Sovereign, in the Organic Act limited the municipal taxing power to two per cent. for ordinary, usual municipal purposes, the same as it limited the amount of indebtedness to be incurred annually to the annual municipal revenues.

The same Sovereign, at a later date, empowered one such municipality to incur a greater indebtedness, for an unusual and other than running expense, and to pledge the faith of its inhabitants for its repayment, and fixed a time when repayment shall be made. Having given authority to incur an unusual expense and to issue bonds for the same,

having fixed the interest charge on such bonds and the time for their redemption, in other words,—*having given special authority to contract a debt, will it not be inferred that there is implied authority to raise funds wherewith to meet the debt* by taxation, even though the amount of such taxes be beyond the limitation set by the statute providing for general municipal purposes?

This position is sustained by a long list of Federal and State decisions.

"The power given to a city council to create an indetebdness by issuance and sale of bonds necessarily implies the power to raise the means with which to pay the interest and create a sinking fund."

First National Bank v. Sorenson, 210 Pac. 900.

A very instructive opinion upon this point has been rendered by the U. S. Circuit Court of Appeals for the Sixth Circuit. The Court explicitly lays down the proposition that

> "Authority to a municipal corporation to levy a tax to pay a debt whose creation is authorized by law may be implied when no mode for payment is provided, and there is no limitation upon the power of taxation which repels such an inference; *and where the debt is for an extraordinary purpose, requiring special authority for its creation, a general limitation upon the power of taxation for ordinary municipal purposes will not exclude such inference;*

but if the Act conferring the power to create the debt, or any other law in force at the time, contains provisions for a tax to meet such obligations no extraordinary powers of taxation can be implied therefrom."

City of Cleveland v. U. S., 111 Fed. 341.

We submit this decision covers our case. The Town of Petersburg has Congressional authority to contract a debt; no mode for its payment is provided; the debt is for an extraordinary purpose which required special authority for its creation; we have a general limitation upon the power to tax for ordinary municipal purposes; the Acts conferring the power to create the debt contain no provision to meet the obligation, and there is nothing which in any way repels the inference that we have implied authority to levy a tax to pay such debt.

"The act gives express power to incur a bonded indebtedness. This is an implied authorization to make provision for the payment of the same. The express power to incur an indebtedness is held to include within such power the power to do all things necessary to effecuate the purpose of the act."

Vallelly v. Grand Forks etc. 111 N. W. 615. 15 L. R. A. N. S. 61.

"The Act authorized an extraordinary indebtedness of the City, and as neither the laws under which the drainage was made nor any other law made any express provision for the payment of the indebtedness so authorized, it is properly and necessarily implied that the legislature intended to authorize the City, as

occasion might require, to levy a special tax to discharge the indebtedness authorized."

United States v. Capdevielle, 118 Fed. 812 (Fifth Circuit).

The Supreme Court of the United States has also ruled upon the question a numberr of times.

The only method which the Town of Petersburg has to pay this bonded indebtedness is by means of taxation for, if Congress had intended that such indebtedness should be paid from returns of the Light Plant, it would surely have said so.

In: *Loan Assn. v. Topeka*, 20 Wall., 660. 87 U. S. 460, it was held:

"It is therefore to be inferred that when the legislature authorizes a county or city to contract a debt by bond, it intended to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the Act itself, or in some general statute, a limitation upon the power of taxation which repels such inference."

Again

"The power of officers of a municipality to levy sufficient taxes to pay its bonds is a legal inference from the authority of the City to issue its bonds in the absence of any limitation or inhibition in the Act which created the power, in the general law or the Constitution."—Id.

"When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation ac-

companies it; *and this too without any special mention that such power is granted.* This arises from the fact that such corporations seldom possess—so seldom indeed as to be exceptional —any means to discharge their pecuniary obligations except by taxation.

"When, therefore, a power to contract a debt is conferred it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former and *such implications cannot be overcome except by express words excluding it.*"

The United States ex rel. Morris Ranger v. City of New Orleans, 98 U. S.-381; 25 Law Ed. 525.

It is fair to say in this connection that Congress, when passing the Bond Acts now under consideration, was fully informed concerning conditions in Alaska. It knew the limitations upon the taxing power of municipalities—it knew that the indebtedness to be created by the sale of the bonds would exceed the ordinary amount of expenses allowable to be incurred under existing laws and it must have known that, authorizing an extraordinary expense or debt to be contracted, the ordinary and existing power to tax would not be sufficient to provide for the payment of the interest and principal when due. It made no provision in the acts for the payment of these items; it gave the town the power to contract and incur a debt and it must, necessarily, have intended to give it the power to provide for the payment of this debt.

Said the Supreme Court of the United States in

County Court of Ralls County v. United States, 105 U. S. 733; 26 Law. Ed. 1220;

"It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality or subdivision of a State, to contract an extraordinary debt by the issuance of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred *is conclusively implied*, unless the law which confers the authority, or some general law in force at that time, clearly manifests a contrary legislative intention. * * The power to tax is necessarily an ingredient of such a power to contract, as ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation. * * *"

As already stated, where the act authorizing the issuance of the bonds particularly provides how payment of the debt shall be met, the purchaser of the bond is limited to the remedy provided for—he may compel a levy of the amount fixed in the act.

This question was before the United States Supreme Court in

United States ex rel. Huidekoper v. County Court of Mason County, 99 U. S. 591; 25 Law. Ed. 331.

In this case Mr. Chief Justice Waite, delivering the opinion of the Court said:

> "When the Act to incorporate the Missouri and Mississippi Railroad Company was passed, the power of counties to tax for general purposes was limited by law to one-half of one per cent. on the taxable property in the County. This limit has never since been increased and the Constitution now in force provides that this tax shall never be increased. *If there had been nothing in the Act* to the contrary, it might, perhaps have been fairly infered that it was the intention of the Legislature to grant full power to tax for the payment of the extraordinary debt authorized, to an amount sufficient to meet both principal and interest at maturity. This implication is however repelled by the special provision for the tax of one-twentieth of one per cent. and the case is thus brought directly within the maxim, expressio unius est exclusio alterius."

From these authorities the rule is well established that where a municipality is given authority to incur an extraordinary debt and no provision is made for the payment thereof, the ordinary method of providing funds to meet such obligations—to-wit, taxation, is proper and the limitations imposed upon the taxing power of municipalities for the raising of revenues to carry on the ordinary municipal functions have no application.

> "Power in a municipal corporation to borrow money and issue bonds therefore implies power to levy a tax for the payment of the obligation that is incurred, unless the contrary clearly appears."

City of Ottawa v. Carey, 108 U. S. 109; 27 Law. Ed. 669.

We fully agree with counsel for the appellee, as stated by him in his brief at page 7 thereof that

> "A statute authorizing a municipality to issue bonds 'in any amount' will be construed to mean any amount within the constitutional or statutory limit and therefore not in conflict with it."

The question now before the court has not reference to the amount of bonds the Town of Petersburg desires to dispose of and the authorities presented by the appellee on this point of the argument do not apply to the point now under consideration.

The second question presented by the appelee is

II.

HAS THE TOWN OF PETERSBURG AUTHORITY TO SELL ELECTRIC CURRENT AND POWER TO BE USED AND CONSUMED OUTSIDE THE CORPORATE LIMITS OF THE TOWN?

At the outset it may be said that it is fully agreed by the Town of Petersburg that it has no authority to engage in a general business of generating and selling electric light and power. But it has Congressional authority to *construct and install a municipal electric light and power plant.* The electric light and power plant shall be a "municipal plant" to be used by and for the municipality

and those residents and inhabitants constituting, as it were, the municipality.

Suppose that the most extreme view that can be taken of appellee's claim, is considered and that it were alleged in the complaint that the Town of Petersburg has threatened and proposes to sell all of its municipally generated light and power to people residing outside the corporate limits, would that be any reason to enjoin the issuance of the bonds? We think not. If the municipality threatened such a proceeding any interested citizen could step into a court of justice and enjoin the City from doing the threatened act.

What may be done with the plant and its product after its construction, is a matter that cannot now be foreseen and it cannot be anticipated that any common council of the future will attempt to deprive the municipality of the right to enjoy the current and power generated by the municipal plant.

There is an allegation in the complaint that the city will sell a substantial portion of the electric energy generated in its plant for use outside of the city limits, but does not recite whether it will sell its surplus electric power after the city has been fully supplied with power and light, or whether it will dispose of power to the detriment of the inhabitants, its customers within the city. The allegation is that it proposes to and will sell a substantial portion of its power outside the city limits.

It would seem that if the purpose of an electrical plant is to supply the individuals of a municipal corporation with light and power and, in the generation of electricity for its consumers within the city, should a surplus of light or power be generated, the municipal authorities may sell such surplus for use without the corporation. Common sense dictates that the surplus should not be allowed to run to waste and, as a matter of business, it would seem to be the duty of the municipal authorities to secure all the revenue possible from its plant provided that the primary purpose of supplying the inhabitants of the city had been fulfilled and no expense by way of extensions or enlargements of its plant with a view to supplying power to parties outside the corporate limits be incured.

While it is generally held that a municipality has no implied authority to furnish light or power beyond its territorial limits, yet many well considered cases hold that having acquired energy in the shape of light and power for municipal purposes in excess of its present corporate needs, it is its duty to apply the surplus for the benefit of its inhabitants.

> "If the municipality may built its own light plant it ought to be permitted to sell the surplus of its product as it would be to sell any of the horses bought for its fire department when they are no longer needed in the public

service, or to sell anything else it rightfully had, but had no further use for."

Overall vs. City of Madisonville, 102 S. W. 278; 12 L. R. A. N. S. 433.

"The contention of counsel is (for the City) that municipal corporations hold all that part of public utilities which they cannot apply to customary municipal uses in trust to waste. This Court held and was sustained by the Supreme Court of the United States, that if a corporation necessarily acquires for the conduct of its business facilities whose entire capacity is not needed for its corporate use, it is not required to hold them in idleness, but has the power and it is its duty, to lease or otherwise apply the surplus for the benefit of its stockholders."

Pike's Peak Power Co. v. City of Colorado Springs, 105 Fed. p. 1 (8th Crt. Ct.)

And a municipal corporation, under similar circumstances, has the same powers and duties as a private corporation.

Mulligan v. Miles City, 153 Pac. 276.

"The City may lawfully lease for private purposes, any excess of water not required for its waterworks."

State v. City of Eau Claire, 35 N. W. 529.

To the same effect:

Rogers v. Wirkluk 94 S. W. 24;

Colorado Springs v. Colorado City, 94 Pac. 316;

Henderson v. Young, 83 S. W. 583.

> The appellee in his opening brief is fearful lest "a tax payer might own an establishment in the city upon which he is paying taxes for the '*retirement of the bonds*' and he might require power which the city could not supply on account of demands made upon it by outside consumers under contracts or agreements with the city."

There is here an admission that even if such unlawful use and disposition of power and light were contemplated by the Town of Petersburg, the issuance and sale of the bonds for the construction of the plant would be perfectly good and any purchaser of such bonds would have a good cause of action against the city in case of failure to pay interest or redeem the bonds when they mature, and such bonds would be good and valid even though the city council of Petersburg should, not only sell and dispose of power to outsiders but even go so far in the dereliction of its duties as to discriminate against the inhabitants of the town. The remedy of the inhabitants is plain. They would enjoin their council from carrying out any such illegal acts and an injunction would rightfully and promptly issue.

Counsel for the appellee, to sustain his contention, refers to the case of

Farrell v. City of Seattle, 86 Pac. 217.

An examination of this case discloses that this was an action to enjoin the City of Seattle from entering into contracts to furnish water to the City of Ballard. The appeal was from an order of the

lower court sustaining the demurrer to the complaint.

The complaint in that case set forth that the City of Seattle had entered into a binding contract with the City of Ballard to furnish the latter municipality with water. The City of Seattle had "sought to bind itself continuously and uninterruptedly" to furnish a definite quantity of water to the City of Ballard, and that "in order for the City of Seattle to comply with the terms of its said agreement it became necessary for this City to expend, and that it did expend, large sums of money in *extending and building* its water mains beyond and without the city limits, *and for the sole and only purpose of delivering water outside of the corporate limits of the City of Seattle.*

It was further alleged that the City of Seattle was about to enter into further contracts with the City of Ballard whereby the former city bound itself to *further extent* its water system beyond and outside its corporate limits and *within the* corporate limits of the City of Ballard, and that, if further extensons are ordered and made the necessary funds will be misappropriated.

A general demurrer to the complaint was sustained.

Upon this state of facts the Supreme Court overruled the lower court and held that the complaint did state a good cause for action.

We find no fault with this ruling. In the Seattle case the City authorities had expended and were about to expend a iarge amount of municipal money "solely for the sole and only purpose" of delivering water outside the city limits. In the case at bar there is no allegation in the complaint that the City of Petersburg proposes to expend one cent for the purpose of selling light or power outside the municipal boundaries.

In the Seattle case the City absolutely bound itself to furnish water to an outside municipality. In the case at bar there is no allegation that the Town of Petersburg has bound itself to do anything. There is a simple allegation that the Town of Petersburg "proposes to sell" to outsiders. We submit the two cases can readiiy be distinguished.

The remaining question raised by the appelle is

III.

HAS THE TOWN OF PETERSBURG AUTHORITY TO BIND ITSELF TO PAY THE BONDS BEFORE THE EXPIRATION OF THE PERIOD PRESCRIBED IN THE ACTS OF CONGRESS AUTHORIZING THEIR ISSUANCE?

Appelle, under this heading, complains about the creation of a sinking fund;

Ordinance No. 64, of the Town of Petersburg, provides that a sinking fund shall be created and

that a sufficient tax levy shall be made to cover the interest on the bonds, as the same comes due, and also to provide sufficient funds wherewith to redeem the bonds at the rate of five thousand dollars per year after the first five years.

The acts of Congress particularly provide that interest on the bonds shall be paid semi-annually and that the bonds must be redeemed within twenty years and in express terms gives the Municipality the right to redeem them serially, at the rate of not to exceed five thousand dollars per annum after the first five years. The Town of Petersburg has taken advantage of this optional provision and by its ordinance No. 64 has provided that five thousand dollars principal of the bonds shall be paid off every year after the first five years.

It is true that the acts of Congress do not provide for a sinking fund, nor do they provide for the levy of a tax on property within the municipality. Congress, by its acts, authorizes the contracting of the indebtedness for certain definite purposes stated, and provided no method for the payment of this indebtedness.

We have already shown (under the first point raised by appellant), that the method and means to be used for such repayment were impliedly left to the municipal authorities. As was said in *Halls County Court vs. Douglas*, 105 U. S. 733 "*in such a case, the power to tax is necessarily an ingredient*

of the power to contract. When authority is granted by the legislative branch of the government to a municipal or subdivision of a state to contract an extraordinary debt by the issue of negotiable securities, the power to levy a tax sufficient to meet at maturity the obligation so incurred, is conclusively implied unless the law which confers the authority or, some general law in force at the time, clearly manifests a contrary intention."

In addition to the authorities cited under the first section of our argument herein, we cite the following:

Ottawa v. Carey, 108 U. S. 122;
Quincy v. Jackson, 113 U. S. 337;
Scotland v. Hill, 140 U. S. 44;
Brackenridge v. McCracken, 61 Fed. 196;
Rose v. McKie, 145 Fed. 590;
United States v. Saunders, 124 Fed. 128.

It must be clear that the authority for the common council to create such a fund is implied by the act. If the power to tax is a necessary ingredient of the power to contract an indebtedness of the nature before us, the power to provide for the raising of the tax is implied.

That Congress had in view the progressive redemption of the bonds is certain since in the act it is provided that the common council might reserve to itself the right of redemption at the rate of

$5,000 annually after five years from the date of issue of the bonds. This option, having been exercised by the common council, it is clear that a fund for such redemption must be provided for, and that such fund, if the option was exercised, was in contemplation by Congress. There is also abundant authority for the proposition that in such case the power to create a sinking fund is implied.

A statute authorizing a bond issue need not itself make provision for a sinking fund; the power is impliedly conferred. McQuillen on MUNICIPAL CORPORATIONS, Vol. V, Sec. 2345. Note.

Vallelly v. Park Commissioners, 111 N. W. 615;

First National Bank v. Swenson, 210 Pac. 900;

Abbott on "MUNICIPAL CORPORATIONS," Secs. 224-305.

The provision for a tax levy to meet the annual expenses incorporated in the ordinance as well as the sinking fund for the gradual redemtpion of the authorized indebtedness is, as the Lower Court in its opinion says: "a meritorious precautionary measure impliedly authorized by the Congressional Act permitting the bond issue."

> "Bonds were to be redeemed within that time (30 years) *at the pleasure* of the County Court. It appears that the bonds are to run not more than twenty years and the court has fixed the time for their redemption after six years and within twenty years; a certain num-

ber of them falling due the 6th year and certain others each succeeding year thereafter until the 20th year. This is the exercise of the "*pleasure of the court.*"

Turpin v. Madison Co. Crt., 48 S. W. 1085.

We respectfully submit that the contentions of the appellant are not well founded, and that the judgment of the lower court, sustaining the defendant's demurer to the complaint, should be affirmed.

Respectfully submitted,

HENRY RODEN,

Attorney for Appellee.